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ABSTRACT

This report--part of a collection of 54 papers from the 48th annual conference of the Education Law Association held in November 2002--discusses student drug testing in Texas public schools. It contains the results of a 2001 study of student drug-testing policies in all 1,056 Texas public-school districts. In response to the Supreme Court's June 2002 decision in "Board of Education v. Earls," a followup study was conducted of responding districts to see if they planned to change their policy in light of the Court's new ruling. ("Board of Education v. Earls" upheld the school district's policy of random suspicionless drug testing of all students who participated in any extracurricular activities and stated that a demonstrated drug-abuse problem is not necessary for a drug-testing regime.) Data for the original study and followup study were gathered through surveys. The principal finding is that Texas school districts are expanding student drug testing. (Detailed survey results are presented in eight tables.) The report concludes that the trend in Texas to expand drug-testing policies may indicate a national trend, and that the balance between student drug testing and Fourth Amendment rights continues to deserve close examination. (Contains 17 footnotes, most court cases.) (WFA)

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The Balance Between Student Drug Testing and Fourth Amendment Rights in Response to *Board of Education V. Earls.*

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November 2002

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The Balance Between Student Drug Testing and Fourth Amendment Rights in Response to *Board of Education v. Earls*

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The Balance Between Student Drug Testing and Fourth Amendment Rights in Response to *Board of Education v. Earls*

Since 1791, the Fourth Amendment to the United States Constitution has protected all persons from unreasonable searches and seizures; specifically the Constitution states that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[1]. Recently, however, this protection has come under scrutiny in one very important context – public schools. Does random, suspicionless drug testing of students constitute an unreasonable search? The Supreme Court has seemingly answered this question with its decision in *Board of Education v. Earls*. [2]

In 1995, the United States Supreme Court rendered its decision in *Vernonia School District 47J v. Acton*,[3] holding that a school district's random suspicionless drug testing of student athletes as a condition for participation in interscholastic athletics did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures. In this particular case, however, the Court noted specific features including student athletes decreased expectations of privacy, the relative unobtrusiveness of the search procedures, and the seriousness of the need met by this search.[4] Regardless of the procedures, however, this case clearly lowered schools' previous legal search standard[5] of "reasonable suspicion," set forth by *New Jersey v. T.L.O*[6] in 1985.[7]

In light of the *Acton* decision and in response to statistics indicating that drug use among students is rising[8], a number of school districts nationwide implemented mandatory drug testing for students.[9] A 2001 study of the student drug-testing policies of Texas school districts revealed that 169 school districts currently engage in drug testing of at least one group of students, usually student athletes or all students engaged in extra-curricular activities. Only two of these districts' policies had been challenged in court.

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[1] Fourth amendment to the United States Constitution, 1791.
[2] 122 S. Ct. 2559, 153 L. Ed. 2d 735
[3] 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995).
[4] Id.
[5] J.A. Stefkovich & G.M. O'Brien, *Students' fourth amendment rights and school safety: An urban perspective*, 29 Education and Urban Society 149 (1997).
[6] 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).
[7] As a result, two appellate courts have upheld random, suspicionless drug testing of students who participate in extracurricular activities not limited to athletics. *See Joy v. Penn-Harris-Madison School Corporation*, 212 F.3d 1052 (7th Cir. 2000) (upholding random drug and alcohol testing of students who participate in extracurricular activities and who drive to and from school; invalidating nicotine testing for students who drive to and from school); *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999), *vacated as moot*, 1999 U.S. App. LEXIS 13289 (8th Cir. (Ark.)); *Todd v. Rush County Schools*, 133 F.3d 984 (7th Cir. 1998), *rehearing with suggestion for rehearing en banc denied*, 139 F.3d 571 (7th Cir. 1998), *cert. denied*, 1998 U.S. LEXIS 4938.
[8] N. Flatt-Moore, *Public schools and urinalysis: Assessing the validity of Indiana Public Schools' student drug testing policies after Vernonia*. 1998 BYU Educ. & L. J. 239.
[9] D. Hawkins, *Trial by vial*, 126 U.S. News and World Report 21(May 31, 1999).

The policies of both Tulia Independent School District[10] and Lockney Independent School District[11] were struck down as violating students' Fourth Amendment rights.

In *Gardner v. Tulia*, the Tulia Independent School District mandated in 1999 a policy that required drug testing of all students in grades seven through twelve who participated in any extra-curricular activities. In Tulia, this population included approximately 80% of the total student body. Tulia implemented this policy using the Supreme Court's *Vernonia* decision for guidance. However, the drug culture among students in *Vernonia* had caused discipline problems of "epidemic proportions." [12] Tulia had no evidence of serious or widespread student drug use at the time the policy was adopted. Furthermore, the district had no data to support any notion that students participating in extra-curricular activities were referred for drug-related disciplinary action. In December 2000, the United States District Court ruled that Tulia's mandatory student drug-testing policy for extra-curricular activity participants was violative of students' fourth amendment protection against unreasonable searches and seizures.

The small panhandle town of Lockney, Texas, took its student drug testing policy even further. The Lockney policy required drug testing of all students, each conducted with parental consent. Students who refused to test or who did not obtain parental consent were treated as though they had a positive test result; students in these circumstances were suspended from participation in all extra-curricular activities for 21 days and removal to in-school suspension for at least three days. When challenged by a single student's family, federal district court overturned an earlier decision and ruled that the Lockney policy violated students' fourth amendment rights[13]. The Tannahill family was the lone family in the district who refused to consent to the testing for their son, who was a junior high student, despite the fact that Lockney's reported student drug use was actually lower than other students statewide. In March 2001, the United States District Court ruled that Lockney's policy of requiring urinalysis of all secondary students was unconstitutional according to the fourth amendment.

In addition to *Vernonia v. Acton*, two additional cases are fundamental in understanding the Tulia and Lockney decisions. The Fifth Circuit's decision in *Aubrey v. School Board of Lafayette Parish* [14] allowed mandatory employee drug testing without requiring evidence of a drug problem; the drug testing policy was justified due to the safety concerns inherit with the employees' duties. In *Brooks v. East Chambers Consolidated Independent School District*, [15]the Fifth Circuit ruled that East Chambers' policy of mandatory random urinalysis of students in grades seven through twelve who participated in extra-curricular activities was a violation of students' fourth amendment protections. The facts of the East Chambers case closely resembled those of the Tulia case.

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[10] *Gardner v. Tulia Independent School District* , 2000 U.S. Dist. LEXIS 20253 (W.D. Tex.).
[11] *Tannahill v. Lockney ISD*, 133 F.Supp.2d 919 (W.D. Tex. 2001).
[12] *Vernonia School District 47J v. Acton*, infra, 515 U.S. at 648-50, 115 S.Ct. at 2388-89
[13] *Tannahill v. Lockney ISD*, 133 F.Supp.2d 919; 2001 U.S. Dist. LEXIS 2251
[14] 92F.3d 316, 318 (5th Cir. 1996)
[15] 730 F.Supp.759 (S.D. Tex. 1989), affirmed, 930 F.2d 915 (5th Cir. 1991)

In direct contrast to these decisions, however, the Supreme Court ruled on the issue of random suspicionless drug testing of students in June, 2002, with its decision in *Board of Education v. Earls*,[16] a 10th Circuit case from Oklahoma in which drug testing of students in any extra-curricular activities was determined to be unconstitutional. In a perhaps surprising 5 – 4 decision, the Supreme Court upheld the school district's policy of random suspicionless drug testing of all students who participated in any extra curricular activities, not just athletics. Using *Vernonia* as a guideline, the 10th Circuit in *Earls* held that "before imposing a suspicionless drug testing program a school must demonstrate some identifiable drug abuse problem among a sufficient number of those to be tested, such that testing that group will actually redress its drug problem." In overturning the 10th Circuit's decision, the Supreme Court's majority in *Earls* stated that "a demonstrated drug abuse problem is not always necessary to the validity of a testing regime." This language is directly contradictory to that of previous drug testing cases, particularly *Tulia* and *East Chambers*. Furthermore, the Court defends this stance by adding that "the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy." Thus, based on the *Earls* decision, random suspicionless drug testing of students does not violate the Fourth Amendment's protection from unreasonable searches and seizures.

This paper offers the comprehensive results from research analyzing the current student drug-testing policies of all 1056 Texas public school districts. A 2001 study of all Texas school districts found that 169 districts had current student drug testing policies. In response to the Supreme Court's decision in *Earls* in June, a follow up study was conducted of respondent districts to see if they planned to change their district policy in light of the Court's new ruling. Did these districts change their policies in response to the *Earls* decision? Why or why not? What types of changes (if any) were made? What are the implications for future policy-making among school districts?

Methodology

The original study of student drug testing policies in Texas began in 2001. According to the Texas Education Agency[17], at that time there were 1056 independent school districts in the state of Texas. This figure does not include charter school districts or common school districts. In February 2001, one survey, with a postage paid return envelope, was mailed to the superintendent of each public independent school district in Texas. With the availability of resources through the Texas Education Agency, every public school district in Texas was included in this study.

The survey instrument used in this study was developed with the assistance of an expert panel of educational leadership professors trained in school law. Field testing was conducted to establish content and construct validity. Specifically, this survey sought the following data:

1. Does your school district currently drug test students?
2. Is this student drug testing restricted to certain populations of students?
3. How long has this policy been in place?

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[16] 122 S. Ct. 509; 151 L. Ed. 2d 418 (2001).
[17] Texas Education Agency, Public School Directory (2000).

4. To your knowledge, has this policy been challenged?
5. If so, in what manner was the policy challenged?
6. If so, what was the outcome of this challenge?
7. If your district does not have a student drug testing policy, do you anticipate that your district will implement one in the future? Why or why not?

Additionally, the survey requested a copy of school board policy FNF, legal and local, which addresses student drug testing issues. These data were collected beginning in February 2001. A second mailing of the survey was conducted in April 2001, to request responses from those districts who had not yet returned their surveys. All responses were entered in a complete database for analysis.

With the Supreme Court's far-reaching decision regarding student drug testing policies in *Board of Education v. Earls* at the end of June 2002, a continuation of this research was deemed appropriate. Along with a cover letter explaining the research study and the *Earls* decision, a survey and self addressed postage paid envelope were sent to all districts that had responded to the original study in 2001; thus, 827 surveys were mailed. For districts that had originally responded that they did have a student drug testing policy, the following questions were asked:

1. Do you plan any changes to this policy in light of the Supreme Court's decision in *Earls*?
2. If yes, how will this change take place?
3. Please explain any other type of changes you foresee in your district's student drug testing policy.

For districts that had responded in the first survey that they did not engage in student drug testing, a slightly different survey was distributed, using the following questions:

1. Do you plan to implement a student drug testing policy in light of the Supreme Court's decision in *Earls?*
2. If yes, what population of students will be subject to testing?
3. Please explain any other types of changes you foresee in the district's student drug testing policy.

Both surveys also asked for the size and location of the responding district, along with any additional comments.

Results/Conclusions

For the original survey, 827 of the 1056 public school districts in Texas returned their surveys; thus, the response rate for the survey was 78.3%. Of these responses, 658 (20.4%) superintendents indicated that their school district did not currently implement a student drug-testing policy; 169 (79.5%) respondent school districts did implement some type of student drug-testing policy. These results are displayed in Table 1.

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Table 1.

Student drug-testing policies.in Texas school districts

N=827

Policy in place	Number of districts	Percentage
Yes	169	20.4
No	658	79.5

A look at the responses to the remaining original 2001 survey questions presented a number of interesting findings. Students involved in extra-curricular activities made up the most-often tested population, the type of policy just recently upheld by *Earls*, followed by student athletes, the precedent set with *Vernonia*. Drug-testing policies for these student populations comprise more than three-fourths of all the public school drug-testing policies in Texas. All students are drug-tested in 28 of respondent districts, the same type of policy that was recently thrown out in *Lockney*. Of these 28 districts implementing mandatory testing, 13 happen to be state-supported group homes or correctional facilities, including Windham School District, the Texas prison education system. Mandatory drug testing of students in these correctional facilities is legal, but clearly the policies for testing all students currently implemented in the remaining 15 districts are somewhat suspect in light of the *Lockney* ruling. Three districts indicated a student testing population of "other," which in all three cases referred to students who drive motor vehicles to or from school. Nine districts indicated that their student drug-testing policies are completely voluntary for students. The response data for these questions are displayed in Table 2.

Table 2.

Student populations included in drug-testing policies.

N=169

Student population	Number of districts	Percentage
Student athletes	53	31.4
Students in extra-curricular activities	76	45.0
All students	28	16.6
Other	3	1.8
Voluntary testing only	9	5.3

The third question in the original 2001 survey asked districts who did have student drug-testing policies how long that policy had been in place. Available responses included less than one year, one to five years, five to ten years, and more than ten years. Drug testing polices had been in place less than one year for 22 of the 169 districts, or 13% of respondents. The majority of policies had been in place for one to five years, which comprised 71.6% of the results, or 121 districts. Nine districts, or 5.3%, have policies that have been in place for five to ten years. Worth noting is the fact that of the 16 districts with policies

over 10 years old, 12 of these schools are state-supported correctional facilities or homes. One district failed to indicate how long their policy had been in place. The results from this survey question are displayed in Table 3.

Table 3

Years of implementation of drug-testing policies.

N=169

Number of years	Number of districts	Percentage
Less than one	22	13.0
One to five	121	71.6
Five to ten	9	5.39
More than ten	16	9.5
No response	1	

Perhaps the most interesting question on the survey was question four, which asked districts that have a student drug-testing policy if said policy had ever been challenged. A few districts responded that parents had questioned the policy or even taken complaints to the school board, but only four districts out of 169 positive responses indicated that their policy had been legally challenged. These four districts represented a mere 2.4% of drug testing policies in Texas schools that had been challenged in the courts. Of these four districts, two failed to offer any explanation of their challenge. The two districts who did elaborate on their challenge were, not surprisingly, Lockney Independent School District and Tulia Independent School District. At the time of the response, the Lockney ruling had not yet been issued. The Tulia response indicated that their policy had been overturned by the district court and was being appealed to the Fifth Circuit. Copies of both schools' current policies were collected. Table 4 displays the data gathered for question 4.

Table 4.

Student drug-testing policies that have been challenged

N=169

Policy challenged	Number of districts	Percentage
Yes	4	2.4
No	165	97.6

The results of the follow up survey conducted after the *Earls* decision also yielded interesting results. Of the 658 surveys mailed for districts that had previously indicated having no student drug testing policy, 264 surveys were returned, thus yielding a 40.1% return rate. Of these 264 districts, only 35 stated that they planned to implement a student drug testing policy in the immediate future. Table 5 illustrates

this finding. Interestingly enough, when asked in the original 2001 survey if their district had any plans for possibly implementing a policy in the future, 69 of the 658 responding districts at that time had indicated an interest in doing so. Thus, 10.5% of responding districts indicated plans to implement a student drug testing policy prior to the *Earls* decision, whereas 13.3% of responding districts indicated plans to implement such a policy after *Earls*.

Table 5.

Student drug-testing policies planned for implementation after *Earls*.

N=264

New policy planned or in place	Number of districts	Percentage
Yes	35	13.3
No	229	86.7

Of the 35 districts that indicated an intent to implement student drug testing after the *Earls* decision, 24 districts stated that the new policy would test all students in extra curricular activities. Five districts planned to test student athletes only, and two districts stated an intent to randomly drug test all students. Three positive responses did not indicate the student population to be tested, and one response stated that students involved in athletics, band, drill team, and cheerleading would be tested (but not other extra curricular activities). Thus, most of the policies enacted after the Supreme Court's decision did indeed follow the precedent recently set. These data appear in Table 6.

Table 6.

Student populations included in new (post-*Earls*) drug-testing policies.

N=35

Student population	Number of districts	Percentage
Student athletes	5	14.3
Students in extra-curricular activities	24	68.6
All students	2	5.7
Other	1	2.9
Voluntary testing only	0	0.0

The data collected for districts that already had a student drug testing policy in place prior to *Earls* were also interesting. In these surveys, districts were asked if they planned to change their policies in light of the Supreme Court's decision. Because originally almost one-third of districts who had student drug testing policies tested only student athletes – in line with the Supreme Court's holding in *Vernonia* – the researcher was interested to see if these districts might follow the Supreme Court's ruling to expand their policies to include all students involved in extra curricular activities, as allowed by the *Earls* decision. The

original 2001 survey generated 169 responses from districts that had student drug testing policies at that time; of those districts, 13 were state schools (such as juvenile justice programs) that had legal jurisdiction beyond that of typical public schools and thus drug tested all their students on a regular basis. Based on this fact, these 13 schools were not included in the follow up survey. Thus, 156 follow up surveys were mailed to districts that had previously indicated use of a student drug testing policy. From this mailing, 78 survey responses were returned, for a 50% return rate. Of these 78 responses, 59 districts indicated no intent to modify or change their policy in response to the *Earls* decision. Nineteen districts did indicate plans to change their policy in some manner. Table 7 illustrates these findings.

Table 7.

Student drug-testing policy changes made after *Earls*.

N=78

Changes to policy planned or in place	Number of districts	Percentage
Yes	19	24.3
No	59	75.6

Of the 19 districts that indicated an intent to modify their student drug testing policies after the *Earls* decision, 12 districts stated that the policy would be modified to test all students in extra curricular activities. Three districts planned to test student athletes only, and no districts stated an intent to randomly drug test all students. One positive response did not indicate the student population to be tested, and one response stated that all drug testing policies would henceforth be voluntary. Perhaps most interestingly, two districts that had active drug testing policies a year ago had chosen to eliminate these policies completely for the upcoming school year. As the date in Table 8 indicate, most of the policy changes made after the Supreme Court's decision mirrored the policy upheld in *Earls*.

Table 8.

Student populations included in modified (post-*Earls*) drug-testing policies.

N=19

Student population	Number of districts	Percentage
Student athletes	3	15.8
Students in extra-curricular activities	12	63.2
All students	0	0.0
Voluntary testing only	1	5.3
Policy eliminated/discontinued	2	10.5

Individual responses generated by the surveys also yielded a variety of unique responses not specifically asked for by the survey questions. For example, one district indicated that its drug testing

procedures were highly unique because they tested using hair samples rather than urinalysis. Given that the obtrusiveness of the search procedures was a critical component of *Vernonia* and was also addressed as important in *Earls*, this alternative approach to urinalysis is quite interesting. One district stated that there was no drug use in its particular area, and several districts indicated that they currently saw little need for testing or that they had "little Board interest." The cost of student drug testing was mentioned by one district as a problem for implementing a student drug testing policy. A large number of districts did indicate that they were carefully researching the possibility of a future student drug testing policy.

Data were also collected concerning the size and geographic location of each responding district. These data will be analyzed for discovering state trends, such as whether most current policies are found in small or large districts or if a particular area of the state supports stricter policies than do other areas.

Whereas the Supreme Court's decision in *Vernonia v. Acton* maintained narrow guidelines by which the student drug testing policy in question was constitutional, the Court's recent decision in *Board of Education v. Earls* greatly expanded school districts' abilities to implement random suspicionless drug testing of students. The Earls decision conflicted with two recent federal district court decisions in Texas that had clearly demonstrated the limitations faced by drug testing districts; *Gardner v. Tulia* struck down a district's policy of testing all students in extra-curricular activities, and *Tannahill v. Lockney* struck down a policy of testing every child in the school. Thus, prior to *Earls* the courts appeared to be indicating that a school district's duty to protect students from physical harm did not extend to the point of limiting these students' constitutional rights. Are student rights diminishing, or are the rights of schools simply becoming more explicit?

Along with the Supreme Court's decision come a number of implications for district level policy. Districts must ensure that they are implementing policies that maintain the confidentiality of student results to the maximum extent possible, that do not involve law enforcement personnel or disciplinary procedures, and that offer testing procedures that are reasonably unobtrusive. The previous need to document a problem with student drug use is no longer necessary, although districts should continue to track this information in order to support their testing policy and measure its effectiveness. An examination of the trend in Texas school districts to continue expanding student drug testing policies may indicate a movement taking place nationwide. Thus, the balance between student drug testing and fourth amendment rights continues to deserve close examination.

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